

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

77-6016

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United States Court of Appeals

For the Second Circuit

Docket No. 77-6016

P/S

BRISTOL-MYERS COMPANY

Plaintiff-Appellant.

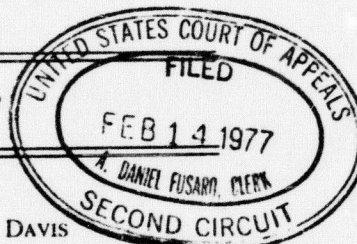
against

FEDERAL TRADE COMMISSION, et al,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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BRISTOL-MYERS COMPANY,

Plaintiff-Appellant,

-against-

Docket No.
77-6016

FEDERAL TRADE COMMISSION, et al.,

Defendants-Appellees.

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BRIEF FOR PLAINTIFF-APPELLANT

Appellant, Bristol-Myers Company ("Bristol"), appeals from the judgment filed January 6, 1977 upon the opinion of Honorable Charles M. Metzner, U.S.D.J., dismissing the complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that the court lacks jurisdiction over the subject matter and that the complaint fails to state a claim upon which relief can be granted.

Issues Presented For Review

1. Did the district court err in dismissing the complaint under Rules 12(b)(1) and 12 (b)(6) on the grounds that the court lacks jurisdiction over the subject matter and that the complaint fails to state a claim upon which relief can be granted, despite the fact that the complaint sought relief from a final action of the Federal Trade Commission ("FTC", or "the commission")?

2. Did the district court err in dismissing the complaint notwithstanding it alleged that plaintiff would be irreparably injured by FTC's denial of its rights as a respondent in an FTC adjudicatory proceeding to conduct ex parte interviews of willing expert FTC witnesses?

3. Did the district court err in dismissing the complaint despite its allegations that plaintiff would be irreparably injured by FTC's denial of its right to discover whether FTC complaint counsel, in the aforesaid FTC adjudicatory proceeding, exerted any improper influence over FTC's expert witnesses to refuse interviews with plaintiff's attorneys outside of FTC counsel's presence.

Statement of Facts

A. The Administrative Proceedings

Bristol is a respondent in an FTC adjudicative proceeding.^{1/} The administrative complaint, issued February 23, 1973, alleges, inter alia, that Bristol's advertising for three of its analgesic products is misleading, unfair, or deceptive in violation of sections 5 and 12 of the Federal Trade Commission Act (15 U.S.C. §§45 and 57). Bristol's answer denied the essential allegations of the administrative complaint. In the course of prehearing procedures, the commission's administrative law judge ("ALJ") issued a prehearing order that sets forth 108 separate issues of fact and 20

^{1/}In the Matter of Bristol-Myers Company et al., Docket No. 8917.

legal issues relating to Bristol alone,^{2/} to be decided in the course of the administrative proceeding (215a-221a; 225a-228a).

On or about December 31, 1975, pursuant to an order of the ALJ, counsel for the commission served Bristol with a "witness list" designating more than 65 persons, at least 30 of them experts of various disciplines, including pharmacology, biochemistry, psychiatry, allergy, statistics, marketing, consumer psychology and behavior, as prospective witnesses for the commission during the course of the adjudicative hearings (311a-346a).^{3/}

Since the commission's rules require that parties seek voluntary interviews before administrative process will issue to compel discovery,^{4/} counsel for Bristol contacted a number of these expert witnesses, seeking to arrange informal interviews regarding their testimony so as to be fully prepared for the hearings. During those contacts it became apparent that several of the witnesses would not agree to voluntary interviews with Bristol's counsel unless complaint counsel were also in attendance, and, further, that in some

^{2/}Additional legal and fact issues apply to co-respondent advertising agencies.

^{3/}Subsequent amendments to the witness list have no material effect on the number of witnesses complaint counsel intends to call.

^{4/}"At any time during the course of a proceeding, whether or not issue has been joined, the Administrative Law Judge, in his discretion, may order the taking of a deposition and the production of documents by the deponent. Such order may be entered upon a showing that the deposition is necessary for purposes of discovery, and that such discovery could not be accomplished by voluntary methods." (16 CFR §3.33; Rules §3.33.)

instances, at least, their refusals were the result of directions or persuasion by complaint counsel.

Bristol brought the problem to the attention of the ALJ during a prehearing conference held on March 3, 1976, during which complaint counsel stated "... we think it is really our right to be present at any of these meetings" (37a, emphasis supplied). Complaint counsel also submitted they had suggested to certain of the witnesses that one of the commission's lawyers attend any such interview and reiterated their view that such attendance was their right (38a).

The ALJ ruled that complaint counsel "may be present at the interview . . . provided that is a desire of that expert witness concerned, and Government counsel have my permission to communicate my ruling to your witnesses." (40a.) Bristol unsuccessfully excepted to that ruling.^{5/}

Thereafter, by application dated March 12, 1976, Bristol sought subpoenas duces tecum and ad testificandum directed to complaint counsel in its own case (Docket No. 8917) and the companion cases, American Home Products Corporation (Docket No. 8918) and Sterling Drug Inc. (Docket No. 8919)

^{5/}MR. WEIL: Your Honor, just so that the record will be clear -- with regard to your previous ruling that Complaint Counsel could communicate your ruling to the prospective witnesses, I would like the record to note that does give me a problem because I think the mere fact they hear from Complaint Counsel with what Ms. McCoy has described as a "suggestion", would itself be an inhibition upon them that maybe they better have them there and would influence and bias what might otherwise be their spontaneous approach and attitudes if they simply heard from me and I was requesting an interview. I think it might not occur to them to think I want Complaint Counsel there, but hearing from Complaint Counsel and maybe the tone of voice could very well alter what would have been their own individual approach. (41a-42a).

to determine what influence FTC attorneys may have exercised over their witnesses' refusals to attend interviews without the presence of complaint counsel. Complaint counsel opposed the application, and the ALJ denied Bristol's request for subpoenas on the ground that it had "shown no justification other than a mere suspicion . . ." and that respondents could "ascertain from individual witnesses at the interviews the information they now seek through subpoenas. . . ." (47a).

Bristol sought reconsideration of the ALJ's denial, pointing out he had not considered its reply to complaint counsel's opposition prior to issuing his order (135a-140a) and stating that Bristol had actual evidence of complaint counsel's having influenced witnesses, which it offered to disclose to the ALJ in camera. (110a, 139a) The offer was not accepted.^{6/} In the alternative Bristol requested that it be allowed to secure additional evidence regarding undue influence from the witnesses themselves outside the presence of complaint counsel. The ALJ denied both this request and Bristol's motion for reconsideration in an order dated April 5, 1976 (49a-50a).

Complaint counsel, under date of April 9, 1976, answered Bristol's motion for reconsideration (146a-151a)^{7/} and, in an accompanying motion of the same date, sought to

^{6/}Obviously, if the complaint is not dismissed for insufficiency upon its face (infra, pp. 8-11) and the district court is allowed to proceed to consider the evidentiary merits, that court will have the same opportunity to satisfy itself by its own in camera inspection.

^{7/}They apparently were unaware that the ALJ had already denied the motion.

strike it as scandalous (156a-159a). Bristol's response (April 21, 1976; 161a-164a) attached a letter from one of the witnesses, Dr. Menguy, as one example of its evidence of complaint counsel's improper influence (164a) and again offered to disclose additional hard evidence to the ALJ in camera (161a).

The Law Judge never ruled on complaint counsel's motion to strike, and never accepted Bristol's offer of evidence in camera.

By application of April 15, 1976 (166a-176a) Bristol requested a determination by the ALJ, pursuant to §3.23(b) of the commission's rules [16 CFR §3.23(b)] permitting Bristol to file an interlocutory appeal to the commission for review of the orders of March 23 and April 5, 1976. Bristol's §3.23(b) request was denied on April 20, 1976, the same day complaint counsel's response in opposition to the motion was filed. The stated reason for that denial was the ALJ's belief that Bristol's evidence need not be submitted in camera and that his previous orders adequately safeguarded its due process rights (52a-53a).

Having exhausted all avenues available to it under the commission's rules, Bristol filed its final effort for administrative relief - an extraordinary one, not provided for in the rules - by way of petition for discretionary review by the commission (182a-200a). The commission's order of May 25, 1976 denied Bristol's petition on the ground that there has been "no showing of a clear abuse of discretion" on the part of the ALJ (56a).

B. Proceedings Before
The District Court

Bristol's complaint was filed on June 8, 1976 (6a-11a), seeking, inter alia, an order that the defendants grant it discovery to determine whether complaint counsel improperly influenced any of their expert witnesses not to grant ex parte interviews to counsel for Bristol. Under date of August 20, 1976 defendants filed their motion to dismiss the complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure (12a-56a, 57a-71a). Bristol's memorandum and affidavit in opposition to the motion to dismiss were filed on September 10, 1976 (72a-104a, 105a-383a).

Defendants' reply memorandum was filed on October 6, 1976 (384a-391a).

The Honorable Charles M. Metzner, U.S.D.J., issued an opinion dated December 28, 1976 (2a-5a), upon which judgment was entered on January 6, 1977, dismissing the complaint (1a).

Bristol filed its notice of appeal on January 12, 1977.

Argument

Precis

Bristol will present the following arguments for the consideration of this Court:

- A. For the purposes of the defendants' motion to dismiss, the district court's failure to accept as true each of the allegations in

Bristol's complaint is, in and of itself, sufficient grounds for reversal.

- B. The injury wrought by FTC's acts complained of to Bristol's prehearing discovery and defense preparation and to its right to effective counsel is of constitutional magnitude, is irreparable, and justifies immediate judicial relief under such authorities as International Business Machines Corp. v. Edelstein, 526 F.2d 37 (2nd Cir. 1975), Gregory v. U.S., 369 F.2d 185 (D.C. Cir. 1966) and Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).
- C. Since Bristol exhausted its administrative remedies before the FTC, the action below was not premature and finds an adequate jurisdictional basis in the Administrative Procedure Act ("APA"), 5 U.S.C. §704, et seq.
- A. The Allegations in the Complaint
Must Be Accepted as True.

All well pleaded allegations in the complaint must, for the purposes of a motion to dismiss, be accepted as true.

It is axiomatic that a motion to dismiss an action for failure to state a claim upon which relief can be granted admits facts alleged in the complaint, but challenges plaintiff's rights to relief based upon those facts. Thus, in deciding such a motion, the

court reviews the allegations of the plaintiff accepting as true all facts well pleaded.

Ward v. Hudnell, 366 F.2d 247 (5th Cir. 1966).

The courts enforce this rule strictly against defendants, since the remedy sought is most drastic and, if successful, puts plaintiff out of court.^{8/} Applying it to the instant action, the commission has admitted, inter alia,

Communications by FTC trial lawyers to prospective witnesses in the above proceeding have been intended and effective to bias said witnesses against agreeing (as would otherwise have been their own disposition) to grant voluntary interviews to counsel for Bristol-Myers Company without complaint counsel being present, thus prospectively depriving plaintiff of a fair trial in [the FTC] proceeding.

Complaint ¶SIXTH (8a).

and,

FTC trial lawyers, on the authorization of the administrative law judge in said proceeding, have communicated to their prospective witnesses the said law judge's ruling that they may, if they wish, refuse to be interviewed by counsel for Bristol-Myers Company outside the presence of complaint counsel, which has had the effect of improperly influencing and prejudicing the prospective witnesses not to grant ex parte interviews to plaintiff's counsel, thus further depriving plaintiff of its fundamental right to a fair trial.

Complaint ¶SEVENTH (8a-9a).

The issue then becomes whether the facts as thus admitted provide a claim upon which relief can be granted

^{8/}Defendants' motion was for dismissal only and not for summary judgment (12a).

and which the district court has jurisdiction to grant.

B. A Proper Claim for Relief Is Made
under IBM and Gregory.

As was briefed to the court below (75a-76a) and will be further explicated, infra, this Court in International Business Machines Corp. v. Edelstein, 526 F.2d 37 (1975) held that where counsel's thought processes and litigation strategy would be exposed to opposing counsel by providing them access to preparatory interviews with willing witnesses, such interviews can and should be held ex parte.^{9/}

[I]nterviews in the presence of opposing counsel did not lend themselves to the free and open discussion which IBM sought.

* * *

A lawyer talks to a witness to ascertain what, if any, information the witness may have relevant to his theory of the case and to explore the witness' knowledge, memory and opinion - frequently in light of information counsel may have developed from other sources. This is part of the attorney's so-called work product.

(Id. at 41, footnote omitted.)

* * *

[T]he restrictions on interviewing set by the trial judge exceeded his authority. They not only impair the constitutional right to effective assistance of counsel but are contrary to time-honored and decision-honored principles, namely that counsel for all parties have a right

^{9/}While the opinion is also concerned with the effect disclosure to the trial court would have on IBM's rights, its primary aim and ultimate thrust is to protect the attorney's work-product by allowing ex parte interviews.

to interview an adverse party's witness
(the witness willing) in private, without
the presence or consent of opposing counsel
and without a transcript being made.
(Id. at 42, emphasis
added.)

And, as cited in IBM, Gregory v. U.S., 369 F.2d 185
(D.C. Cir. 1966) held that it was improper for a prosecutor
to instruct witnesses not to speak to anyone about the case
unless the prosecutor were present, and that such conduct
will not be countenanced. "[T]he prosecutor [has no] right to
interfere with the preparation of the defense by effectively
denying defense counsel access to the witness except in his
presence." (id., at 188).

That Gregory's rule is not restricted to criminal
proceedings is established by its envelopment into IBM; and
the Gregory court itself wrote (as IBM noted at 526 F.2d 44)
"A criminal trial, like its civil counterpart, is a quest for
truth. That quest will more often be successful if both sides
have an equal opportunity to interview the persons who have
information from which the truth may be determined." 569 F.2d,
at 188.

Both IBM and Gregory act with telling force
here.

Bristol alleges (and it must be accepted, supra, pp.
8-11) that certain expert witnesses were improperly influenced
by FTC's lawyers to refuse its attorneys interviews without
complaint counsel being present. Bristol, therefore, seeks
an order allowing discovery of complaint counsel and the expert
witnesses so that it may develop fully the nature, extent and

effect of such improper influence as a preliminary to, and foundation for, subsequently demanding such relief as may be shown to be necessary and appropriate in light of the discovered facts.

In support of its applications to FTC for such discovery, Bristol offered to make available, in camera, (139a) additional hard evidence in its possession showing that there had indeed been at least some improper influence.^{10/} The firmness of conviction held by complaint counsel that they have a "right" to attend Bristol's interviews makes it highly likely, in and of itself, that they would have so expressed themselves to the witnesses, by word, manner or tone. In light of what Bristol has shown and offered to show further, the statements by the ALJ and the district judge that it possesses no more than "mere suspicion" are indefensible. (Neither of them mentions the Menguy letter (164a) or explains his failure to do so.) Bristol has more than adequately demonstrated a sufficient basis to warrant further discovery as to the full facts. Its demand for that much relief at this time cannot be looked upon as frivolous or paranoid.

Such obstruction of Bristol from conducting ex parte interviews as it has reason to believe has occurred causes precisely the kind of injury condemned in IBM: the

^{10/}Bristol has placed on the record one letter which quite clearly evidences improper influence on the part of complaint counsel (164a). It is Bristol's position that the additional data it has concerning improper influence which it offered to give in camera need not be disclosed to its adversaries; that would needlessly expose counsel's strategy, thinking and work-product, and neutralize valuable tools for its conduct of the discovery itself.

tactics, strategy and work-product of counsel are jeopardized; Bristol's constitutionally protected right to effective counsel (IBM, p.10, supra,) is violated; due process is impaired.

The injury caused by requiring Bristol to conduct interviews in the presence of complaint counsel, or not at all, would, contrary to the findings of both the ALJ (53a) and the district court (4a), be both grievous and irreparable. For example, the main objective of interviewing an adversary's witnesses is to probe what their answers might be on given subjects if cross-examined concerning them. In an ex parte interview the exploration can probably be disguised well enough that the witness might not see through to its real import. If his responses are favorable to the interviewer he can then pursue the lines of cross-examination with greater confidence of the outcome; if unfavorable, he is forewarned to shun the inquiry. In either event, the interviewing attorney is better able to prepare his client's defense without, at the same time, helping the opponent polish his attack; for that is precisely what can happen if he is present to monitor the interview. An adverse attorney's trained faculties will readily pierce to the true thrust of the interrogation; he will reap the fruit of the interviewer's planning, tactics, work product. The most likely result will be that the interviewer must forego exploring areas that might prove crucially beneficial to his client out of fear that he might, instead, educate the opposing lawyer or uncover for him theories and evidence he might not otherwise enjoy. Whatever the outcome, it cannot but be an

encroachment upon, a restriction and derogation of, Bristol's right to full and effective representation by its counsel and to due process in its defense.

Counsel cannot be expected to have formulated a finished presentation at the outset of his preparation and endeavors. To require that his initial investigatory efforts be of a quality which counsel would willingly include as part of his client's final case is to set up an impossible standard; to ask him to submit his initial probings, notwithstanding their lack of effectiveness in his client's behalf, is in effect to ask counsel to deny his client the effective representation to which he is entitled. See, Code of Professional Responsibility, Canon 7.

IBM, 526 F.2d, at 42.

Once Bristol's counsel have been compelled either to undertake their lines of investigation under FTC counsel's watchful eyes and finely tuned ears, or to forego them, the injury will have been made choate. How would Bristol ever be able to prove to a court of appeals, some years hence, what helpful evidence a suppressed set of interview questions would have revealed, or the manner in which adverse counsel's privity to the interviewer's efforts enhanced the prosecution of their own case?

Beyond that, for review of this matter during an appeal under 15 U.S.C. §45(c) of a final cease and desist order to be adequate would require -

- 1) that even if the cease and desist order were properly founded in every other respect, a court of appeals would nonetheless set it aside upon the sole ground of defendants' actions complained of herein; and

2) that, upon the consequent remand and rehearing before the commission, measures could be applied which would at this late time give Bristol relief as adequate as that which can now be timely granted.

Any allowance for reality must dictate that neither of these essentials can be assuredly anticipated.

The administrative proceeding poses more than 100 issues of fact, many of them involving complex matters of biochemistry, pharmacology, and of consumer perception, behavior and psychology (215a-225a). It also raises approximately 20 issues of law, including those of serious and, so far, first impression under the newly enacted Magnuson-Moss Warranty--Federal Trade Commission Improvement Act of 1975,11/ and under the first amendment's guarantee of free speech (225a-229a). Complaint counsel's listing sets forth a minimum of 65 persons they intend to call as witnesses, 30 of which, at least, are to present expert testimony (311a-346a). Complaint counsel also identify 706 documentary exhibits to be put into evidence in the course of the administrative hearings (237a-309a). There is no predicting at this point how extensive the defenses of the three administrative-respondents will be.

Any remaining doubt as to the voluminous magnitude, the considerable complexity, and the prolonged duration of the commission's proceeding, and of the scope of a court of

11/88 Stat. 2113 (codified in 15 U.S.C. §41, et seq.).

appeals' task in reviewing it, would be dispelled by complaint counsel's pre-hearing brief in the administrative proceeding (348a-383a).

While ideally, and possibly theoretically, all of this should not interfere with plaintiff's receiving at the hands of an appellate court total consideration of every point advanced by it, merely the mechanical limitations upon the length of its brief and the time for its oral argument must severely circumscribe its ability to present its case on the matters involved here to the court of appeals, in conjunction with the panorama of all of its other arguments, with anywhere near the completeness available to it in this action; and surely a court of appeals, with all the other issues concurrently presented to it, could ^{not} be expected to allocate time or concentration, as this Court can, to the discrete matter here involved. Even if it could do so, there would be far more by way of inhibitory influences upon it than exist here against granting plaintiff, relief at the expense of upsetting a cease and desist order at that late date in light of all the public and private time and expense that would thus be made waste.

But suppose a court of appeals would, despite all that, vacate a cease and desist order for no reason other than that plaintiff has been aggrieved and adversely affected in the manner set forth herein. What remedy could be offered, and how could it be adequate?

At that stage there would not have been evidence before the court of appeals upon which it could finally deter-

mine whether the commission had, in fact, so intervened with the witnesses as to deprive plaintiff of ex parte interviews it would otherwise have enjoyed. The most a court of appeals could do would be to order the commission to then grant plaintiff the discovery it seeks now. But by that time the memories of deponents will have weakened (in this matter the details as to manner and content of oral communications between complaint counsel and their witnesses are quite important), some of them may have become unlocatable (the complaint counsel whose statements appear in the transcript attached to the moving affidavit, Ms. McCoy, has already left the commission), and pertinent records and memoranda may have become misplaced, lost or destroyed.

Of further crucial importance, witnesses who might at this stage be willing to grant Bristol's counsel a private interview can certainly be expected to change their attitude after they have been through the ordeal of testifying and of having been cross-examined during the FTC hearings by those very attorneys. Neither the court, nor even the commission itself, would seem to be empowered to compel such witnesses to subject themselves to the ex parte interviews, and surely neither could command the type of cooperation and openness from them that Bristol's counsel may be able to obtain at this time.

IBM provides an instructive analog. It came to this Court by a petition for relief in the form of a writ of mandamus, 28 U.S.C. §1651 and Fed. R. App. Proc. 21. One of the issues

presented, and the first one discussed by this Court was whether a party has a right privately to interview an adverse witness. It is virtually the same issue underlying the within action and this appeal. This Court granted the petition.

By permitting that extraordinary procedure,^{12/} this Court recognized not only the importance of ex parte interviews, but as well the essentiality of not deferring until after a final judgment review of the district court's intermediate order prohibiting such interviews of government witnesses by defending counsel.

This Court's granting of a petition for a writ of mandamus to review immediately the right to conduct ex parte interviews is testimony of the highest order that it considers the denial of that right an irreparable injury. Its acknowledgement, implicit in allowing non-deferred "relief" via the rarely exercised writ of mandamus, that subsequent review won't correct such a denial demonstrates that expedited judicial attention is called for in the within case.

The district court's proposition that Bristol will have adequate relief by proceeding at this time with exposed interviews, since it can start them by interrogating into what role FTC counsel may have played in the witnesses' elections that they not be ex parte is possibly based upon a

^{12/} "Mandamus, of course, is an extraordinary remedy", requiring "unique and exceptional circumstances", Goldman, Sachs & Co. v. Edelstein, 494 F.2d 76, 78 (2nd Cir. 1974). "Mandamus is only available in extraordinary cases" and the court "must determine whether any error of the district court is of sufficient magnitude to justify the issuance of mandamus", U.S. v. Lasker, 481 F.2d 229, 232 (2nd Cir. 1973).

misapprehension of what actually took place in the commission proceedings. The ALJ's order of April 5, 1976 precludes Bristol from interrupting, without terminating, the interviews even if the early answers support its belief as to improper influencing. The order refuses to allow the witnesses to be subjected to more than one interview.

Respondents' request that they be permitted to interview complaint counsel's expert witnesses with respect to the issue of improper influence without complaint counsel's presence in all cases is also denied. Under the circumstances of this case, there is no need to subject complaint counsel's expert witnesses to repeated interviews by respondents' counsel. Furthermore, such a procedure will needlessly prolong the pretrial proceedings and should be avoided.

(49a-50a)

Further, even as to preliminary inquiries into FTC counsel's conduct, it seems quite apparent that the witnesses' responses are apt to be far different when given under the cold gaze of those same lawyers than if elicited in the less inhibiting environment of a private discussion with Bristol's counsel alone.

Thus, Bristol has established its right, under IBM and Gregory, to ex parte interviews of willing witnesses and, therefore, to the relief requested below -- discovery into improper influences that may have frustrated that right.13/

13/ It is important to note that the ultimate relief to be applied should the discovery requested bring to light sufficient undue influence on the part of complaint counsel is not at issue here. The relief to be fashioned if such impropriety is shown should be left in the first instance to FTC, subject to subsequent judicial review as appropriate. Bristol need not show, and this Court need not decide, whether such interference actually occurred. The relief presently sought is merely to be allowed discovery to dig out as specifically as possible, before memories stale and records drop out of sight, just what complaint counsel did communicate to the witnesses; and, based on that, the extent to which Bristol's rights have been violated, and what can timely be done to remedy the situation.

Bristol has shown that the denial of that right will cause irreparable injury to the preparation and presentation of its defense and its right to a full and fair administrative hearing. The only questions remaining are: Is the within action premature, and does the district court have jurisdiction to hear Bristol's complaint?

C. Bristol Exhausted Its
Administrative Remedies.

. . . [Bristol's] claim is asserted prematurely and is properly dismissed for failure to exhaust administrative remedies. Judicial review of Federal Trade Commission proceedings is governed by Section 45(c) of Title 15, United States Code, which limits the power of review to final cease and desist orders. Section 10(c) of the Administrative Procedure Act, 5 U.S.C. §704, provides:

"Agency action made reviewable by statute ... [is] subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."

(4a; Opinion below,
p.3.)

That holding presumes that this action is premature and that the prematurity is caused by a failure to exhaust administrative remedies. It further presumes that the combination of 15 U.S.C. §45(c) and 5 U.S.C. §704 "limits review" of the acts complained of to appeal from a cease and desist order, thus denying the district court of jurisdiction. What follows will discuss exhaustion and then prematurity. In connection with the latter the issue of jurisdiction will be dealt with.

1. Exhaustion of Administrative Remedies.

Faced with the realities of the situation, Bristol unsuccessfully took all the procedural steps available to it on the administrative level after the ALJ's denial of its discovery requests. Bristol made its application (116a-124a; pp. 4-5, supra), moved for reconsideration (135a-144a; p. 5, supra), sought certification to the commission of the ALJ's denial (166a-176a; p. 6, supra)^{14/} and even filed an extraordinary application for review by the commission (182a-200a; p. 6 supra).

No administrative step remains open to Bristol with regard to ex parte interviews. All of the avenues for administrative relief were pursued to no avail. Bristol's only recourse was to the district court.

2. Prematurity.

Despite Bristol's having exhausted its administrative remedies the district court determined that judicial review of the ALJ's denial of discovery must await final review of any cease and desist order issued by FTC. But, Bristol respectfully suggests, the district court disregarded that portion of the APA (5 U.S.C. §704), and the case law decided under it, which specifically provides for review in these circumstances:

"Final agency action for which there
is no other adequate remedy in a
court. . . ."

^{14/}The ALJ's rejection of even Bristol's offer of additional evidence, in camera, (52a-53a) makes the success of any later request for similar relief problematical; the possibility of real relief from the ALJ remains remote.

The agency action, insofar as it concerns Bristol's right to effective counsel as affected by complaint counsel's interference with Bristol's ex parte interviews of FTC witnesses and the denial of discovery into that interference, is most certainly final (55a-56a); and, subsequent review will not be adequate (see pp. 14-20, supra).

More than a quarter century ago this Court held that district courts need not await final determination of an agency proceeding before reviewing disputes engendered by action on intermediate administrative matters therein where there is an "assertion of a constitutional right . . . not transparently frivolous", Fay v. Douds, 172 F.2d 720 (2nd Cir. 1949).^{15/} Other circuits even though postdating §704, have come into accord with that doctrine, The Coca-Cola Company v. FTC, 475 F.2d 299, 303 (5th Cir. 1973); The Seven-Up Company v. FTC, 478 F.2d 755, 757 (8th Cir. 1973); Miami Newspaper Printing Pressman' Union Local v. McCulloch, 322 F.2d 993, 996 (D.C. Cir. 1963).

IBM, with facts parallel to those alleged in the complaint, establishes the violation of a constitutional right, 526 F.2d at 42. See p. 10, supra; Coppolino v.

^{15/}While the Second Circuit apparently has not finally decided the question whether the Administrative Procedure Act independently and additionally confers jurisdiction for review of agency action, Greene County Planning Board v. FPC, 528 F.2d 38, 46 (2nd Cir. 1975), the majority of circuits have determined that it does. See, for example, Pickus v. United States Board of Parole, 507 F.2d 1107 (D.C. Cir. 1974); Bradley v. Weinberger, 483 F.2d 410 (1st Cir. 1973); Deering Milliken, Inc. v. Johnston, 295 F.2d 856 (4th Cir. 1961); Sanders v. Weinberger, 522 F.2d 1167 (7th Cir. 1975); Brennan v. Udall, 379 F.2d 803 (10th Cir. 1967); Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970).

Helpern, 266 F.Supp. 930 (S.D.N.Y. 1967). At least one other circuit similarly has so held, Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966):

Here the defendant was denied that opportunity which . . . elemental fairness and due process required that he have.

Id. at 188.

As has been demonstrated, Bristol has substantial (certainly more than "transparently frivolous") reason to believe that the identical constitutional right protected in IBM, Gregory and Coppolino may have been infringed in its proceeding before the commission.^{16/} Certainly, if the district court has jurisdiction to vindicate the right itself, it must also have jurisdiction to order inquiry into the preliminary question of whether, and to what extent, the right has been infringed. Fay v. Douds, supra at 732; Coca-Cola, supra at 303. That is what it has been asked to do. It is of little consequence to plaintiff whether the discovery process necessary to that end be conducted at the administrative level pursuant to the court's mandate, as sought in the complaint, or whether it be done via Rules 26, et seq. as a part of the within action in the course of determining the full scope of relief appropriate herein. But the right must one way or another be enforced.

The Supreme Court in its Abbott Laboratories trilogy^{17/} made plain that requests for relief from administrative action

^{16/} Supra, at pp. 3-6.

^{17/} Abbott Laboratories v. Gardner, 387 U.S. 136; Toilet Goods Association v. Gardner, 387 U.S. 158; Gardner v. Toilet Goods Association, 387 U.S. 167 (1967).

should be given "hospitable treatment" by a court. Pertinently, in Abbott, final regulatory action had not yet been exercised by the agency against the plaintiff.

... the Administrative Procedure Act ... embodies the basic presumption of judicial review to one "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," 5 U.S.C. §702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 U.S.C. §701(a). The Administrative Procedure Act provides specifically not only for review of "[a]gency action made reviewable by statute" but also for review of "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. §704. The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation. Shaughnessy v. Pedreiro, 349 U.S. 48, 51, 75 S. Ct. 591, 594, 99 L. Ed. 868; see United States v. Interstate Commerce Comm'n, 337 U.S. 426, 433-435, 69 S. Ct. 1410, 1414-1415, 93 L. Ed. 1451; Brownell v. We Shung, supra; Heikkila v. Barber, supra. Again in Rusk v. Cort, supra, 369 U.S. at 379-80, 82 S. Ct. at 794, the Court held that only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review. See also, Jaffe, Judicial Control of Administrative Action 336-359 (1965).

Abbott, 387 U.S. at 140-41 (footnote omitted); to same effect, Gardner. Cf., Toilet Goods Association, 387 U.S. 167 (1967). Cf., Toilet Goods Association.

The Supreme Court's recent pronouncement in Dunlop v. Bachowski, 421 U.S. 560 (1975) militates even more strongly in favor of judicial review. Citing Abbott Laboratories, it reaffirmed its position that judicial review will not be denied unless it can be persuasively shown that congress intended such a deprivation. (Id. at 1857.) By its motion (57a-71a), the commission convinced the district court to dismiss with the argument that sections 5(c) and 5(d) of the Federal Trade Commission Act, 15 U.S.C. §45 (c) and (d) coupled with 5 U.S.C. §704 preclude review and thus fall within the exceptions to Abbott.

But, none of these sections, nor any other statute, "precludes such relief" as the plaintiff seeks from the court.

FTC relies upon the sentence in section 704 that reads, "A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." This provision does not, however, undertake to declare which preliminary, procedural or intermediate agency actions or rulings are or are not directly reviewable; and it certainly does not mandate that preliminary, procedural or intermediate agency actions or rulings as such shall not be directly reviewed. As Abbott pointed out, citing Rusk v. Cort, "Only upon a showing of the 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review" (supra, p. 24). Section 704 is hardly "clear and convincing evidence" that congress intended to withhold judicial review in the circumstances and at the stage that Bristol now finds itself. To the contrary,

§704 would appear more to manifest congressional concern that no conduct by an administrative agency that could prejudice a private party, even though it be merely "preliminary, procedural or intermediate" should not go without judicial review at some time or stage than to betoken an intent to foreclose judicial relief when it can do the most good at the least cost to all concerned, - public and private, courts and parties.

Indeed, recent commentary indicates the strong disposition of the authorities toward review of agency action:

There is [by] now virtually a presumption in favor of review, which makes review the rule and nonreviewability an exception which must be demonstrated.

Schwartz, Administrative Law Cases During 1975, 28 Admin. L. Rev. 131, 143 (Spring 1976).

And, a fortiori, that presumption must apply to the present case, where Bristol's injury is of constitutional magnitude (IBM, p. 10, supra).

But, even if Bristol had not, in fact, done all it could to seek redress at the administrative level, - had not truly exhausted its administrative remedies - the rule precluding immediate judicial review is not carved in granite:

The doctrine [exhaustion of administrative remedy] is applied in a number of different situations and is, like most judicial doctrines, subject to numerous exceptions, see e.g., Layton & Fine, The Draft and Exhaustion of Administrative Remedies, 56 Geo. L.J. 315,

322-331 (1967). Application of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved.

McKart v. United States,
395 U.S. 185, 193 (1967).18/

Exceptions are as applicable to FTC as to other administrative agencies. E.g., B. F. Goodrich Co. v. FTC, 208 F.2d 829 (D.C. Cir. 1953), appeal after remand, 242 F.2d 31 (1957):

Our problems are whether the District Court had jurisdiction and whether the complaints stated a claim upon which relief could be granted. Those problems boil down to whether the complaints allege the sort of damage which will support injunctive relief against an administrative regulatory order.

208 F.2d at 832.
(footnote omitted).

and

We think the proper disposition of the cases under the circumstances is to remand them all with directions to the District Court to entertain them as an initial step, and if upon hearing it develops that some of the plaintiffs are not actually threatened with damage by way of disruption of business, those complaints can be dismissed.

208 F.2d at 834.

Union Bag-Camp Paper Corporation v. FTC, 233

F. Supp. 660 (S.D.N.Y. 1964) although a case where the complaint was dismissed (88a), is also illustrative:

18/See also, Leedom v. Kyne 358 U.S. 184 (1958); Boire v. Greyhound Corp., 376 U.S. 473 (1963); Oestereich v. Selective Service System Local Board No. 16, 393 U.S. 460 (1970).

If we are satisfied that the Commission has violated a statutory mandate here, we will not require plaintiff to wait until it is ordered to cease and desist from violating Section 7 of the Clayton Act before obtaining redress.

* * *

Plaintiff is claiming that the agency action was in direct derogation of the alleged statutory command to supply it with 6(b) reports. Clearly, the instant action falls within the ambit of both Leedom and Boire as one involving the interpretation and construction of a statute.

Id. p. 663.19/

The District of Columbia Court of Appeals reversed a district court which had held that it lacked jurisdiction to stop the commission from proceeding upon an administrative complaint in Elmo Division of Drive-X Co., Inc. v. Dixon, FTC, 348 F.2d 342 (D.C. Cir. 1965):

Were this an action between private parties, appellant would be hard pressed to demonstrate absence of an adequate remedy at law and this would ordinarily render specific relief inappropriate. Here, however, the injury which appellant asserts is one for which any adequate legal remedy is very remote.

. . . The gist of appellant's complaint is . . . that the Commission may not institute any complaint proceeding against it in relation to matters covered by the consent order until the necessary preliminary findings have been made at a reopening hearing reviewable by a Court of Appeals. Given the nature of the injury claimed, an appellate court reviewing an order resulting from the new complaint proceeding can afford appellant no meaningful remedy.

Id. at 347 (footnotes omitted).

19/The court dismissed the complaint on its merits on the ground that plaintiff did not have any statutory right to the relief it sought. Here, of course, plaintiff is relying upon constitutionally and otherwise established rights as defined in I.B.M. and Gregory.

Jewel Companies Inc. v. FTC, 432 F.2d 1155 (7th Cir.

1970) held that jurisdiction existed to review immediately an asserted misunderstanding by one of the commissioners (whose vote was determinative to issuance of the commission's complaint) as to the construction of the commission's obligation of enforcement under sections 2(c) and 11 of the Clayton Act, 15 U.S.C. §§13(c) and 21:

The question raised is inherently a legal one and does not involve any factual determinations Since the question is one of statutory construction as to the authority of a Commissioner in voting for the issuance of a complaint for violation of Robinson-Patman and does not involve any substantive determination by the Commission, the Commission's reliance upon Myers v. Bethlehem Shipbuilding, supra, is misplaced. . . . The legal obligation of a Commissioner can be determined by the courts without delay and we think the proper approach is to allow such inherently legal attacks prior to an agency's final order.

Id. at 1159 (footnote omitted).20/

Summary

A jurisdictional basis under the APA is provided if the following criteria are satisfied:

1. Is plaintiff suffering legal wrong or being adversely affected or aggrieved by action of the defendants? 21/

20/Illustrations of interlocutory judicial intervention despite purportedly exclusive appellate procedures under the National Labor Relations Act are found in Farmer v. United Electrical, Radio Machine Workers of America (UE), 211 F.2d 36 (D.C. Cir. 1953) and Miami Newspaper Printing Pressman's Union Local v. McCulloch, 322 F.2d 993 (D.C. Cir. 1963).

21/"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. §702.

2. Is that action final? 22/

3. Does any statute preclude the district court from giving plaintiff the relief it seeks? 23/

4. Does plaintiff have other adequate remedy in a court for defendants' action? 24/

Bristol successfully meets each of those tests, thus vesting the court with present jurisdiction:

1. The legal wrong inflicted by defendant most certainly adversely affects Bristol (pp. 12-20,).

2. The agency action is final (p. 21, supra).

3. There is no statutory bar to the relief sought (pp. 23-26, supra).

4. There is no adequate remedy available in a court (pp. 14-20, supra).

Conclusion

Since the district court erred in dismissing the complaint as a matter of law, and since it was properly invested

22/" . . . final agency action . . . [is] subject to judicial review." 5 U.S.C. §704.

23/Abbott, p. 24, supra; Dunlop, p. 25, supra.

24/" . . . for which there is no other adequate remedy in a court . . . " 5 U.S.C. §704.

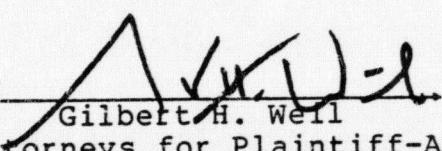
with jurisdiction, the judgment dismissing the complaint should be reversed.

Dated: New York, New York
February 10, 1977

Respectfully submitted,

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Service of three ③ copies of the within
is admitted this 11th day of February 1977

COPIES RECEIVED

Robert B. Fiske Jr.
UNITED STATES ATTORNEY

2/11/77

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